HOUSE OF LORDS
Library Note

Defamation

This House of Lords Library Note looks at recent issues surrounding defamation in preparation for the forthcoming debate on Lord Lester of Herne Hill's private member's Defamation Bill on Friday, 9 July 2010. In particular, this Note looks at recent developments on defamation, the multiple publication rule, "libel tourism" and conditional fee agreements.

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1. Introduction

This House of Lords Library Note looks at a number of issues relating to defamation in preparation for the second reading of Lord Lester of Herne Hill's private member's Bill on defamation (9 July 2010). At the outset, it may help the reader to provide a brief description of defamation. In general terms, the law relating to defamation is intended to protect the reputation of a person or organisation. The most commonly applied definition is: "a statement should be taken to be defamatory if it would tend to lower [the claimant] in the estimation of right-thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally" (*Skuse* v *Grenada Television* [1996] EMLR 278 at 286).

Under English law, there are two separate civil actions for the publication of defamatory matter. Where the defamatory matter is in writing or in some other permanent form, the action will be for libel. Where the defamatory matter is by word of mouth, the action will be for slander. The main defences to an action for defamation are:

- Justification—the words complained of are true;
- Fair Comment—the expression of an opinion on a matter of public interest;
- Absolute Privilege—immunity from liability in certain situations conferred by Statute, secondary legislation, common law or convention, for example parliamentary and court proceedings;
- Qualified Privilege—where the public interest in ensuring freedom of communication outweighs the protection of reputation of an individual; and
- *Reynolds* Privilege—a recent development, which in essence is a defence of publication in the public interest.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, implemented in English law through the Human Rights Act 1998, has exerted an influence on the law relating to defamation. In particular, a balance must be struck between article 8 of the convention on the right to respect for private and family life, and article 10 on the right to freedom of expression.

Further, more detailed information on this subject can be found in *Duncan and Neill on Defamation*. The reader may also find *Defamation: Comparative Law and Practice* (2006) by Andrew T Kenyon and *Defamation and Freedom of Speech* (2008) by Dario Milo useful. The House of Commons Library have published a Standard Note, *Reform of Defamation Laws* (17 March 2010, SN/HA/5409), on the subject. The next section of this House of Lords Library Note will look at some of the recent developments in the debate on defamation. The remainder of the Note will then focus on the key issues of the multiple publication rule, "libel tourism", and conditional fee agreements. A select bibliography is included at the end of the Note.

2. Recent Developments

There have been a number of recent, high profile cases which have prompted a re-evaluation of the law relating to defamation, and, in particular, its impact on freedom of speech. Examples include: the allegations made by the *News of the World* on 30 March 2008 that Max Mosley, the then President of the Federation Internationale de l'Automobile and son of Oswald Mosley, the founder of the British Union of Fascists, had engaged in a sado-masochistic sex session with a number of women referred to by the paper as an "SS-style medical examination" with orders "barked in German" (*Mosley* v *News Group Newspapers* [2008] EWHC 1777 (QB)); the libel action brought by the parents of Madeleine McCann, who went missing on a family holiday in Portugal, against the *Daily Express*, *Daily Star*, *Sunday Express* and *Star on Sunday* in relation to 110 articles published between September 2007 and February 2008 alleging that Madeleine's parents were responsible for her death (see, for example, Matthew Moore, 'Madeleine McCann: Daily Express Publishes Apology to "Tapas Seven"' (16 October 2008), in the *Telegraph*); and the libel action brought against the author Simon Singh by the British Chiropractic Association in relation to an article he wrote in the *Guardian* criticising the association for defending chiropractors who use treatments for which there is little evidence on children with conditions such as colic and asthma (*BCA* v *Singh* [2010] EWCA Civ 350).

The first two examples contributed to the decision of the House of Commons Culture, Media and Sport Select Committee to inquire into the balance of the freedom of the press against the rights of citizens to privacy. The committee published their report, *Press Standards, Privacy and Libel* in February 2010 (HC 362 of session 2009–10). The committee made a number of recommendations, including: that it was not necessary to legislate on privacy at present; the Press Complaints Commission should amend its code of practice to require journalists to normally notify the subject of an article before publication; defendants should continue to have to prove their allegations, with the exception of corporations where the burden of proof should be reversed; where the United Kingdom is not a claimant's primary domicile or place of business, they should face additional hurdles before they are allowed to bring an action; success fees recoverable from the losing party should be limited to no more than ten percent; the PCC should be renamed the Press Complaints and Standards Commission to reflect its role as a regulator and not only as a complaints handling service; the PCC should have the power to fine its members and to suspend the printing of a publication for one issue; and there should be an incentive for newspapers to comply with self-regulation, perhaps through reductions in the costs burden in defamation cases for members of the PCC who provide an alternative route for redress. The PCC responded to the committee's report in March 2010 (HC 532 of session 2009–10), and the then government did so in part in a written statement in March 2010 (HC *Hansard*, 23 March 2010, cols 33–4WS), and more fully in April 2010 in a command paper (Cm 7851).

In September 2009, the Ministry of Justice published a consultation paper on the multiple publication rule, under which each publication of defamatory material can give rise to a new cause of action. The paper was titled *Defamation and the Internet: The Multiple Publication Rule* (CP 20/09), and a response to the consultation was published on 23 March 2010 (CP(R) 20/09). In January 2010, the then Secretary of State for Justice and Lord Chancellor, Jack Straw, convened a working group to examine the substantive law on libel in response "to concerns about the possibility that our libel laws are having a chilling effect on freedom of expression" (HC *Hansard*, 27 January 2010, col 58WS). The terms of reference were: "to consider whether the law of libel, including the law relating to libel tourism, in England and Wales needs reform, and if so to make recommendations as to solutions". The *Report of the Libel Working Group* was

published on 23 March 2010, and focused on libel tourism; the role of public interest considerations in establishing a defence to a libel action; the rules about multiple publication, with particular reference to the internet; and procedural and case management issues relating to the conduct of libel litigation.

A further initiative in relation to defamation was on costs, and, in particular, on conditional fee agreements, which result in lawyers only being paid if they win the case. In December 2009, Lord Justice Jackson's *Review of Civil Litigation: Final Report* was published, which contained a number of proposals for the reform of costs in defamation cases (see chapter 32). In January 2010, the Ministry of Justice published the consultation paper *Controlling Costs in Defamation Proceedings* (CP 1/2010), in which they sought views on interim measures while they considered Lord Justice Jackson's proposals. A response to the consultation was published on 3 March 2010 (CP(R) 1/2010), and subsequently the then government tabled the draft Conditional Fee Agreements (Amendment) Order which was passed by the House of Lords (HL *Hansard*, 25 March 2010, cols 1152–78), but was rejected by the House of Commons (House of Commons, First Delegated Legislation Committee, 30 March 2010, col 21).

Recently there have been two major reports by interest groups. The first, *Free Speech Is Not For Sale: The Impact of English Libel Law on Freedom of Expression*, was published in November 2009 by an inquiry committee set up by English PEN and Index on Censorship. The inquiry committee held meetings with lawyers, editors, publishers and bloggers, as well as with a number of other stakeholders. They concluded that "the law needs to facilitate the free exchange of ideas and information, whilst offering redress to anyone whose reputation is falsely or unfairly damaged" (page 3). Their recommendations were: the claimant should have to demonstrate damage and falsity; damages should be capped at £10,000; the Brunswick (multiple publication) rule should be abolished and a single publication rule should be introduced; no case should be heard in this jurisdiction unless at least ten percent of copies of the publication have been circulated here; a tribunal should be established as a low cost forum; the public interest defence should be strengthened; the definition of fair comment should be expanded; base costs should be capped and success fees and "after the event" insurance premiums should not be recoverable; interactive online services and interactive chat should be exempt from liability; and large and medium sized corporations and associations should be exempt from libel law unless they can prove malicious falsehood. Together with Sense about Science, Index on Censorship and English PEN "have amassed a groundswell of popular support", with over 50,000 people signing their petition (John Kampfner, 'The Quiet Revolution Gains Momentum' (31 May 2010), in the *Guardian*).

In December 2009, a group of libel lawyers formed Lawyers for Media Standards. They commissioned Professor Alastair Mullis of the University of East Anglia and Dr Andrew Scott of the London School of Economics and Political Science to write the report, *Something Rotten in the State of English Libel Law—A Rejoinder to the Clamour for Reform of Defamation*, published in January 2010. In their report, they state that they "recognise the potential for misuse of libel law so as to preclude investigative journalism, to stifle scientific debate, to undermine the work of NGOs or to invite the strategic legal tourist from abroad" (page 2). However, they are concerned "that the critique of the libel regime is too broad and the reforms proposed too sweeping and indiscriminate. The public commentary on libel law has been remarkably one-sided, and in some respects dangerously over-simplified. We are nervous that the important societal functions performed by libel law have been underplayed. Libel reform should be coherent, not piecemeal and un(der)-principled". They "highlight criticisms of libel law" that they feel are "based on error or misunderstanding", including the need for the revision of rules on jurisdiction; the improvement of the public interest defence; the broadening of the fair

comment defence; and the exemption of internet hosts and interactive chat from liability. They go on to "respond to criticism of libel law" that they "consider misjudged", including the reallocation of proof and the proposal to cap libel damages (page 3). Finally, they "highlight those aspects of the criticism that are potentially of substance, and which are deserving of more full attention", including: the introduction of a single publication rule for online publication; the introduction of a libel tribunal or other cost saving process changes; denial of standing to corporate entities; relieving the costs burden; and introducing legislation to permit defendants to counter-sue abuse claimants.

In addition to the changes to conditional fee agreements, the previous government concluded, in the light of the report of the Libel Working Group, the recommendations of the House of Commons Culture, Media and Sport Select Committee and the consultation paper on the multiple publication rule that: "On the basis of all the views that have been submitted... [we] are convinced that reform of the law on libel is needed, and that action should be taken on a number of aspects of the current law and procedures. We will take steps to implement the necessary changes on as timely a basis as possible. However, in some instances primary legislation may be necessary. Where this is the case, we propose to develop our thinking further and come forward with detailed proposals to include a draft Bill for introduction as soon as parliamentary time allows in the new parliament" (HC *Hansard*, 23 March 2010, cols 33–4WS).

Lord Lester of Herne Hill introduced his private member's Defamation Bill (HL Bill 3) in the House of Lords on 26 May 2010. He has issued a set of *Explanatory Notes*. The Bill was prepared by a number of senior lawyers, including ones from the *BBC*, the *Guardian* and the *Times*, with members of English PEN, Index on Censorship, Article 19 and Sense About Science providing advice, and contains 22 clauses and 3 Schedules. The Bill would:

- Introduce a statutory defence of responsible publication on a matter of public interest;
- Clarify the defences of justification on fair comment, renamed as 'truth' and 'honest opinion';
- Respond to problems of the internet age, including multiple publications and the responsibility of internet service providers and hosters;
- Protect those reporting on proceedings in parliament and other issues of public concern;
- Require claimants to show substantial harm, and corporate bodies to show financial loss; and
- Encourage the speedy settlement of disputes without recourse to costly litigation.

(Press statement on behalf of Lord Lester of Herne Hill, quoted in Laura Oliver, 'Lord Lester's Libel Reform Bill goes before Parliament' (27 May 2010), on *Journalism.co.uk*)

In an article published in the *Times*, Lord Lester commented:

> Until now, libel law has remained the preserve of a small group of lawyers skilled in its complex rules and procedures. It has been left to judges to fashion the law,

> in concert with some piecemeal reforms in the 1950s and 1990s that never addressed free speech and could not have anticipated a culture of online publication and debate...
>
> Current English libel law gives robust protection to reputation at the expense of freedom of speech. Its 'chilling effect' on what people are prepared to publish has been aggravated by uncertainty about whether defences can be relied upon, and by conditional fee agreements that permit claimants' lawyers to be unjustly enriched at the expense of writers and publishers. Claimants have been able to pursue claims where publication has caused them no substantial harm, and large corporations have brought actions against NGOs and newspapers without having to prove financial loss...
>
> The Defamation Bill, prepared with help from expert colleagues, sets out stronger and clearer defences and strikes a fairer balance between private reputation and public information. It is not a charter for irresponsible journalism, or a rigid code. It contains a simple framework of principles to be taken into account, so the law is applied with a sense of proportion...
>
> Freedom of speech is the lifeblood of democracy, but good reputation must be protected against irresponsible journalism. My Bill seeks a better balance. I hope it will get a second reading and government support. It will be debated, fought over and improved, but reform should not be delayed. The last Parliament abolished the common law offences of criminal, seditious and blasphemous libel. The civil law is more chilling in its impact on the right to free speech than criminal law. The new Parliament must tackle the issues now.
>
> (Anthony Lester, 'Libel Must be Rebalanced in the Scales of Justice; Our Present Laws have a Chilling Impact on Free Speech—The Lifeblood of Democracy' (24 May 2010), in the *Times*)

Lord Lester's Defamation Bill does not deal with:

- The regulation of costs in defamation proceedings, for which statutory powers already exist;
- The award of damages, as to which the principles now established by the courts give sufficient guidance to ensure reasonable legal certainty and proportionality; and
- Questions about misuse of private information, breach of confidence, or data protection, which are beyond its scope.

> (Defamation Bill, *Explanatory Notes*, pages 5–6)

The Guardian Legal Network, part of the *Guardian* website, carried out an analysis of the Defamation Bill, and pointed to a few areas of concern, such as the defence of public interest (clause 1) and the substantial harm requirement (clause 12), praising others such as the "take down" defence (clause 9) and the reversal of the multiple publication rule (clause 10) (Guardian Legal Network, 'What does Lord Lester's Defamation Bill Propose?' (27 May 2010), on the *Guardian* website). Overall, the Guardian Legal Network thought that "on first reading... the Bill contains some solid work and interesting proposals. But it is not radical or wide ranging and does not "rebalance" or "recast" the law of libel. If anything it will add further layers of complexity and increase costs. It is not a substitute for a thorough going review of the existing law".

An editorial in the *Guardian* echoed this analysis: “The Bill is not perfect; it does nothing about the burden of proof. But it is a wide-ranging and thoughtful attempt to rectify many of the glaring and rather shaming features of the present” (Editorial, ‘Libel Laws: In the Public’s Interest’ (7 June 2010), in the *Guardian*). A piece in the *Times* commented: “This is not a Bill to promote irresponsible journalism, or to placate newspapers whingeing about libel. It seeks to restore the right balance between those who pursue public interest reporting and those who seek to defend themselves from malicious attacks. If nothing is done the result will be increasing self-censorship, because of uncertainty over what constitutes ‘fair comment’ and because of the size of damages that can be awarded...” (‘Redressing the Balance’ (25 May 2010), in the *Times*).

Libel lawyers have commented on the Bill. Writing in the *Solicitors Journal*, Rod Dadak, head of defamation at Lewis Silkin, said: “The Defamation Bill is a waste of parliamentary time which should be dedicated to dealing with the massive economic problems this country has. It is just a sop to the cash-strapped media. Now is not the time for a more liberal interpretation of the law but a time to be conservative; not to have change to appease the media, as opposed to the public, and not to interfere with the fundamental human right of defending one’s good name” (Rod Dadak, ‘Out of Touch’ (8 June 2010), in *Solicitors Journal*, vol 154, no 22, page 8). Sarah Webb, head of commercial litigation, media and libel at Russell Jones and Walker, also writing in the *Solicitors Journal*, concluded: “The Bill does deal with some issues that needed reviewing and simplifying, but it is questionable whether or not it has achieved its aims and certainly whether some of the proposals for codification and proof of damages will just increase complexity and, by necessity, frontload costs” (Sarah Webb, ‘Chill Out’ (15 June 2010), in *Solicitors Journal*, vol 154, no 23, page 8).

In relation to the present government, the Coalition Agreement states: “We will review libel law to protect freedom of speech” (Coalition Government, *The Coalition: Our Programme for Government* (May 2010), page 11). This was reiterated in a recent written answer by the Parliamentary Under-Secretary of State, Ministry of Justice, Jonathan Djanogly: “We are committed to reviewing the law on defamation with a view to ensuring that freedom of speech and academic debate are protected and that a fair balance is struck between freedom of expression and the protection of reputation” (HC *Hansard*, 9 June 2010, col 150W).

3. Multiple Publication Rule

The multiple publication rule and its effect on the internet are explained in *Duncan and Neill on Defamation*: "Each communication of defamatory matter to a publishee is in law a separate publication. This means, for example, that in the case of a letter which is read by a number of different people in turn a series of publications takes place. And if the libel is contained in a book or newspaper each publication to each publishee of each copy of the book or newspaper is a separate publication... The principle that each communication is a separate publication means that, for limitation purposes, time will start to run again whenever the defamatory matter is communicated afresh. This gives rise to special difficulties for defendants who publish material on the internet, which may remain easily accessible many years after it was first made available" (paragraph 8.07). This rule is also sometimes called the "repeat publication" or "Brunswick" rule after the case that established the rule: "The Duke of Brunswick sent his manservant to purchase a back issue of the *Weekly Dispatch*, which he believed had libelled him some 17 years previously. The court ruled that this sale constituted a fresh publication so that the Duke was able to successfully sue for libel" (House of Commons Culture, Media and Sport Select Committee, *Press Standards, Privacy and Libel* (February 2010, HC 362 of session 2009–10), page 56).

In their report, *Press Standards, Privacy and Libel* (February 2010), the House of Commons Culture, Media and Sport Select Committee thought that a balance needed to be struck "between allowing individuals to protect their reputation and ensuring that newspapers and other organisations are not forced to remove from the internet legitimate articles merely because the passage of time means that it would be difficult and costly to defend them" (page 59). In order to do so, the committee recommended that a one year limitation period on actions brought in respect of publications on the internet should be introduced. However, they thought that the limitation period should be extendable if the court was satisfied that a claimant could not reasonably have been aware of the publication's existence. Once the limitation period had expired, the claimant would not be able to recover damages, although they would be entitled to obtain a court order to correct a defamatory statement.

In September 2009, the Ministry of Justice published the consultation paper *Defamation and the Internet: The Multiple Publication Rule* (CP 20/09), and the response was published in March 2010 (CP(R) 20/09). The Ministry of Justice received 34 responses, with the largest group of respondents coming from the legal profession (23 percent), followed by individuals (21 percent) and media organisations (15 percent). The majority (55 percent) of respondents favoured the introduction of a single publication rule, which would mean that the limitation period for bringing an action would run from the date of the first publication instead of running from the time of each publication of the defamatory matter. One-third (29 percent) of respondents favoured the retention of the multiple publication rule, with 11 percent favouring a third option proposed in the consultation paper under which the multiple publication rule would be retained, while extending the defence of qualified privilege, which grants limited protection on public policy grounds provided certain requirements are met, where a publisher is willing to place a notice on the archive. The general consensus of respondents was that changes to the current rule on multiple publication should not just apply to the internet, but to all forms of publication.

In their report, the Libel Working Group, convened by the then Secretary of State for Justice and Lord Chancellor, Jack Straw, came to the conclusion "that there are two broad options for protecting a publisher from legal action outside the one year limitation period running from the date of the first publication. Either a single publication rule could be introduced (with the court having discretion to extend the one year limitation period

where appropriate) or the multiple publication rule could be retained but with a new exception (either extending the scope of qualified privilege or introducing a similar free-standing defence based on a notice requirement)" (Ministry of Justice, *Report of the Libel Working Group* (23 March 2010), page 21). They thought that different considerations should apply depending on whether the defamatory material had been republished by the original publisher or a different one. The majority of the group preferred the single publication rule with discretion where the republication is by the same publisher. However, where republication was by a different publisher, the working group could not form a consensus as to which option should be preferred.

In their response to the report of the House of Commons Culture, Media and Sport Select Committee, the then government stated: "In the light of the responses received to its consultation paper, *Defamation and the Internet: The Multiple Publication Rule*, and the views expressed by the select committee and the Libel Working Group, the government considers that it is appropriate to introduce a single publication rule, whereby a defamation claim will have to be brought within one year from the date of the original publication, subject to a discretion to the court to extend this period as necessary" (Secretary of State for Culture, Media and Sport, *The Government's Response to the Culture, Media and Sport Select Committee on Press Standards, Privacy and Libel* (April 2010, Cm 7851), paragraph 3.38).

The report by the interest groups English PEN and Index on Censorship, *Free Speech Is Not For Sale: The Impact of English Libel Law on Freedom of Expression* (November 2009), welcomed the then government's consultation on the subject and thought "that the introduction of a single publication rule would bring online publication in line with print, ensuring that no libel action can be brought a year after publication" (pages 11–12). They therefore recommended the abolition of the "Brunswick rule". In contrast, the report commissioned by Lawyers for Media Standards, *Something Rotten in the State of English Libel Law—A Rejoinder to the Clamour for Reform of Defamation* (January 2010), does not consider the single publication rule, even with the possibility of discretionary extension, to "always allow for an appropriate balance to be struck between article 10 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms] rights to communicative freedom and competing rights to privacy and reputation" (pages 25–6). The report did not consider it appropriate that "the author and the host of an impugned archive statement" should automatically be absolved "of any responsibility for its making after the requisite limitation period following first publication". They went on to explain: "Not every author of a defamatory statement—or every archivist of online content—is deserving of exoneration from liability. In the online environment, the availability of past statements can continue to be horrendously damaging".

Lord Lester of Herne Hill's Defamation Bill provides, in clause 10, for the limitation period in an action for libel or slander to run, as a general rule, from the date the publication was first made available to the public. The *Explanatory Notes* state "this prevents a claimant from bringing an action in defamation in relation to a publication which first became available to the public more than one year previously, except in certain specified circumstances" (page 30). However, subsequent publication must, in order to be protected, "be made by the same publisher, be of the same or substantially the same content, and publication must not be made in a materially different manner". The Guardian Legal Network, part of the *Guardian* website, thinks that this provision "merits serious consideration" (Guardian Legal Network, 'What does Lord Lester's Defamation Bill Propose?' (27 May 2010), on the *Guardian* website).

4. Libel Tourism

The term "libel tourism" is used to cover a variety of situations in which actions for defamation seem to have a tenuous link to England and Wales. In their report, the Libel Working Group explain that libel tourism "usually involves the situation where a person from outside England and Wales issues proceedings in a court of England and Wales in order to sue another person from outside England and Wales. Additional factors may involve the extent to which parties are connected to England and Wales, for example, whether the claimant has a reputation which is particular to England and Wales; the extent of the defendant's relationship to this jurisdiction compared with elsewhere; where the allegedly defamatory material is primarily published and targeted at; and the extent of publication in this jurisdiction compared with elsewhere" (Ministry of Justice, *Report of the Libel Working Group* (23 March 2010), page 4).

There have been a number of instances of libel tourism reported in the press. For example, Peter Wilmshurst, a consultant cardiologist at Shrewsbury Hospital, was sued for libel in England by the United States manufacturer of a heart implant device after he criticised the efficacy of the device at a medical conference in the US. They did not sue the US online journal that published a version of his speech (David Leigh, 'Libel: The Doctor and the Corporations—US Medical Firm Takes Trip to UK Courts to Sue Consultant' (11 November 2009), in the *Guardian*). Another example is the case of the US academic Rachel Ehrenfeld, who was successfully sued in England by a Saudi businessman over allegations of financing terrorism published in her book, 23 copies of which were sold in the United Kingdom, all having been purchased over the internet from the US (Ken Macdonald, 'Cult of the Forbidden: English Libel Law is as Real a Threat to Free Inquiry as the Repressive Zeal of Anti-Terrorism Policy' (11 November 2009), in the *Guardian*). As a consequence of this case, New York State passed the Libel Terrorism Protection Act, which declares that foreign libel judgments will be unenforceable, "unless the foreign law grants the defendant the same First Amendment protections that are available in New York State" (Jonathan Watson, 'Cover Feature' (April 2010), in the *International Bar News*, pages 15–19). Other US states have adopted similar measures, and a Free Speech Protection Act is being considered by the US Congress.

Further concern over courts hearing "foreign" libel cases was expressed in 2008 by the United Nations Human Rights Committee in the context of the International Covenant on Civil and Political Rights:

> The Committee is concerned that the State party's practical application of the law of libel has served to discourage critical media from reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism". The advent of the internet and the international distribution of foreign media also create the danger that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.
>
> (United Nations Human Rights Committee, *Sixth Periodic Report of the United Kingdom on the Implementation of the International Covenant on Civil and Political Rights* (July 2008, CCPR/C/GBR/6), paragraph 21)

The grounds on which the court will decide whether a claim can be served outside the jurisdiction are contained in a Practice Direction to the Civil Procedure Rules:

> Service out of the jurisdiction where permission is required
> 3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under the rule 6.36 where—
>
> General Grounds
> (1) A claim is made for a remedy against a person domiciled within the jurisdiction.
>
> (2) A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction.
>
> (3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and —
>
> (a) there is between the claimant and defendant a real issue which it is reasonable for the court to try, and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
>
> (4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim.
>
> (Practice Direction 6B, paragraph 3.1)

As part of their inquiry into press standards, privacy and libel, the House of Commons Select Committee on Culture, Media and Sport looked into jurisdiction and libel tourism. In the context of the UN report and the laws passed in the US, they stated: "Whatever the constitutional situation, or diplomatic niceties, we believe that it is more than an embarrassment to our system that legislators in the US should feel they need to take retaliatory steps to protect freedom of speech from what they view as unreasonable attack by judgments in UK courts" (House of Commons Culture, Media and Sport Select Committee, *Press Standards, Privacy and Libel* (February 2010, HC 362 of session 2009–10), page 54).

In order to gauge the extent of the problem of libel tourism, the committee had asked for figures on the number of cases challenged on the grounds of jurisdiction and their success rate. No information had been provided, and they recommended that "the Ministry of Justice and the Court Service should as a priority agree a basis for the collection of the statistics relating to jurisdictional matters, including claims admitted and denied, successful and unsuccessful appeals made to High Court judges and cases handled by an individual judge" (page 55). Overall, they concluded that "in cases where neither party is domiciled nor has a place of business in the UK, we believe the claimant should face additional hurdles before jurisdiction is accepted by our courts. On balance, we believe there is sufficient evidence to show that the reputation of the UK is being damaged by overly flexible jurisdictional rules and their application by individual High Court judges" (page 56). The committee recommended that consideration should be given as to how the Civil Procedure Rules could be amended "to introduce additional hurdles for claimants in cases where the UK is not the primary domicile or place of business of the claimant or defendant".

The Working Group on Libel convened by the then Secretary of State for Justice and Lord Chancellor, Jack Straw, considered the evidence available on libel tourism and had varying views as to the extent of the problem. They concluded that "to the extent that there was a view that there was a problem to be addressed, it was considered that tightening and more rigorous application of the rules/practice relating to service out of the jurisdiction would be appropriate. The critical issue is enabling courts at an early stage to identify cases which constitute an abuse and where no real and substantial tort has been committed within the jurisdiction" (Ministry of Justice, *Report of the Libel Working Group* (23 March 2010), page 15). The working group went on to identify a number of options to deal with the issue, which revolved around amending the Civil Procedure Rules (see further pages 15–16).

In their response to the House of Commons Select Committee report, the then government acknowledged the concerns over libel tourism and "that this is having a 'chilling effect' on the freedom of speech" (Secretary of State for Culture, Media and Sport, *The Government's Response to the Culture, Media and Sport Select Committee on Press Standards, Privacy and Libel* (April 2010, Cm 7851), page 8). They thought that "the working group's proposals in this area will provide effective practical benefits to address problems relating to the issue of libel tourism, and intend to raise them with the Civil Procedure Rule Committee and encourage the committee to consider them as soon as possible". Furthermore, they would monitor the effectiveness of any changes and would consider legislative change if the problems should continue. In relation to the select committee's request for data, the then government responded that they would instigate information gathering to assess the effectiveness of the changes proposed and the need for any further action.

The report published by English PEN and Index on Censorship, *Free Speech Is Not For Sale: The Impact of English Libel Law on Freedom of Expression* (November 2009), saw the multiple publication rule and the internet as contributing factors to libel tourism. They recommended that libel actions should only be heard in England "if it can be shown that at least ten percent of the total number of copies of the publication have been circulated here. Cases relating to publication on a foreign internet site should only be heard if the article in question has been advertised or promoted in England and Wales by or on behalf of the defendant" (page 12). The authors felt that this would address the "international embarrassment" of the UK and would create a more equitable mechanism for "hearing libel cases in an age of global communication".

The authors of the report commissioned by Lawyers for Media Standards are not convinced that the rules on jurisdiction "that are said to permit libel tourism are in themselves at all problematic" (Professor Alastair Mullis and Dr Andrew Scott, *Something Rotten in the State of English Libel Law—A Rejoinder to the Clamour for Reform of Defamation* (January 2010), page 14). They explain that at the moment claimants have to demonstrate that they do possess a reputation and that defamatory publication has occurred here. Damages will only be recoverable for harm caused here, and the courts can and do "strike out a claim as an abuse of process where no 'real and substantial tort' has been committed". The proposals put forward in the report by English PEN and Index on Censorship "would be entirely arbitrary and unprincipled" and "would result in obvious injustices, and would envision the legitimisation of the wanton traducing of individual reputations" (page 15). The authors are "comfortable with the phenomenon of libel tourism", although they are concerned with the scale of legal costs incurred by overseas defendants, particularly "where threats to sue are made by powerful overseas interests on the basis of legal argument that is tenuous at best with the aim of precluding critical comment here or in other jurisdictions". The issue can, according to the authors, be resolved without amending the rules on jurisdiction.

5. Conditional Fee Agreements

Conditional fee agreements are colloquially referred to as “no win, no fee” agreements. This means that legal counsel will only be paid if the claim is successful, and they will then also be entitled to an extra fee known as a success fee. The basic and extra fees will usually be paid in whole or in part by the person who has lost. In December 2009, Lord Justice Jackson’s *Review of Civil Litigation Costs: Final Report* was published, containing, amongst others, proposals for the reform of costs in defamation and related claims (see chapter 32). In January 2010, the Ministry of Justice published a consultation paper titled *Controlling Costs in Defamation Proceedings* (CP 1/2010), in which they sought views on an interim measure proposed for dealing with what they called “disproportionate costs” while they considered Lord Justice Jackson’s proposals. The proposal was to reduce the success fee that lawyers can charge in defamation cases conducted under conditional fee agreements from 100 to 10 percent of the basic fee. The response to the consultation was published on 3 March 2010 (CP(R) 1/2010). The majority of the 57 respondents (53 percent) favoured the proposal. These included all responding media and non-governmental organisations and seven (out of 25) respondents from the legal profession. However, the remaining respondents (47 percent) were opposed to the proposal.

The House of Commons Culture, Media and Sport Select Committee also considered the issue of conditional fee agreements in their report, *Press Standards, Privacy and Libel* (February 2010, HC 362 of session 2009–10). They concluded that the costs in cases involving conditional fee agreements were too high, and that such cases “are rarely lost, thereby undermining the reasons for the introduction of the present scheme” (page 76). However, they thought that access to justice needed to be preserved for those who had been defamed, and they did not agree with the proposal put forward by the Ministry of Justice for success fees to be capped at ten percent. They also did not think that “success fees should become wholly irrecoverable from the losing party”. But, they did “support the recoverability of such fees from the losing party being limited to ten percent of costs leaving the balance to be agreed between solicitor and client”. The committee thought that this “would address the key issue and seems to us to provide a reasonable balance, protecting access to justice, adequately compensating solicitors for the risks taken, giving claimants and their lawyers, in particular, a strong incentive to control costs and ensuring that costs to a losing party are proportionate”.

The report *Free Speech Is Not For Sale: The Impact of English Libel Law on Freedom of Expression* (November 2009) by English PEN and Index on Censorship welcomed the government’s consultation, but thought that measure did not go far enough. They proposed “abolishing the recovery of success fees from losing defendants in libel cases and mandatory cost-capping of base costs to limit the level of fees” (page 14). However, the report by Professor Alastair Mullis and Dr Andrew Scott, *Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation* (January 2010) disagrees with this proposal: “We would be concerned... that bald reforms of this nature would so disincentivise claimant lawyers as to result in the withdrawal of offers to act on conditional fee agreements with attendant repercussions for access to justice for most claimants. We would be concerned that the government’s recent proposal to limit ‘success fees’ to a maximum ten percent uplift on costs may have this effect. We are loathe to see libel become once again exclusively a rich man’s law” (page 32).

In their response to the select committee’s report, the government noted that the committee did not agree with their proposal to reduce the success fee to ten percent in defamation cases. They argued the proposal “is an interim measure that can be

implemented quickly to address immediately the concerns around high costs, while we consider the recommendations of the committee and Lord Justice Jackson in detail for the long term reform of conditional fee agreements in this area" (Secretary of State for Culture, Media and Sport, *The Government's Response to the Culture, Media and Sport Select Committee on Press Standards, Privacy and Libel* (April 2010, Cm 7851), page 11). The then government decided to implement the interim proposal and laid the draft Conditional Fee Agreements (Amendment) Order 2010 before both Houses of Parliament. Despite concerns expressed by the House of Lords Merits of Statutory Instruments Committee in their *14th Report of Session 2009–10* (18 March 2010, HL Paper 94 of session 2009–10), the Order was passed by the House of Lords (HL *Hansard*, 25 March 2010, cols 1152–78), but was not passed by the House of Commons (House of Commons, *First Delegated Legislation Committee*, 30 March 2010, col 21) and has therefore not come into force.

In response to an oral question tabled by Lord Lester of Herne Hill in June 2010, the Minister of State, Ministry of Justice, Lord McNally stated that the current government "are currently considering the recommendations from Lord Justice Jackson's report, *Review of Civil Litigation Costs*, published in January 2010. The government's analysis of Sir Rupert's recommendations, once completed, will determine the next steps on the success fee in defamation proceedings" (HL *Hansard*, 21 June 2010, cols 1164–6).

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